Supreme Court, U.S.
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OFFICE OF THE CLERK

In The Supreme Court of the United States

MICHAEL A. KOZIS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

PETITION FOR WRIT OF CERTIORARI

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46 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the trial court erred in not suppressing the evidence obtained from an unreasonable search and seizure of a trash can of a private residence? (Tr. 4-26-00, p. 66).

2. Whether the trial court erred in not suppressing evidence from an execution of a search warrant when the affidavit lacked any indicia of probable cause? (Tr. 4-26-00,p. 75).

3. Whether the trial court erred in the imposition of the mandatory minimum sentence of Virginia Code § 18.2-308.2? (Tr. 2-21-01, pp. 20-21).

4. Whether the trial court erred in the imposition of the mandatory minimum sentence of Virginia Code § 18.2-308.4? (Tr. 2-21-01, pp. 20-21).

LISTINGS OF ALL PARTIES TO THE PROCEEDINGS IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

The parties to the proceeding in the Virginia Supreme Court are the same as the parties who appear in the caption of this case.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and The Associate Justices Of The Supreme Court.

Michael Kozis, by counsel, petitions for a Writ of Certiorari to review the judgment of the Supreme Court of Virginia in this case.

OPINIONS BELOW

Opinion, Supreme Court of Virginia (July 16, 2003) (Upon a Petition for Appeal)(App. 1)

Opinion, Supreme Court of Virginia (November 1, 2002) (Granting Appeal) (App. 2)

Opinion, Supreme Court of Virginia (January 25, 2002)(Denying Petition for Appeal) (App. 3)

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JURISDICTION

The opinion of the Supreme Court of Virginia was entered on July 16, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourth, Fifth, and Sixth Amendments of the United States Constitution.

STATEMENT OF THE CASE

On December 3, 1999, the Petitioner appeared before the Honorable Pamela Albert of the Virginia Beach General District Court for a preliminary hearing. The Petitioner was charged with possession with intent to distribute more than one half ounce, but less than five pounds of marijuana, possession of cocaine, possession of a firearm in the commission of a felony. All charges were certified to the grand jury and indictments were subsequently issued.

On April 26, 2000, Petitioner appeared, by counsel, before the Honorable Kenneth N. Whitehurst, Jr. of the Circuit Court of Virginia Beach in a motion to suppress the evidence obtained during an illegal search of his trash receptacle. Petitioner's motions were overruled and a conditional guilty plea was subsequently tendered.

The Honorable A. Bonwill Shockley presided over the sentencing in this matter on February 21, 2001, and sentenced Petitioner to five years for possessing a firearm in the commission of a felony, two years for possessing a firearm while in possession of narcotics, four years for possession with intent to distribute marijuana and three years for possessing cocaine. All seven years of the drug charges were suspended.

Petitioner was released on bond pending appeal to the Supreme Court of Virginia. On September 28, 2001, the

Court of Appeals of Virginia affirmed the trial court's ruling and a three judge panel further upheld the trial court in an opinion dated November 16, 2001. On July 16, 2003, the Supreme Court of Virginia denied Petitioner's petition for appeal.

On September 10, 1999, Detective J.A. Dinonno of the Virginia Beach Police Department executed a search warrant upon the premises of 1724 Pope Street in the city of Virginia Beach. (Tr. 4-26-00, p. 8). The warrant was obtained on the basis of a sworn affidavit from the same day to which Detective Dinnono was the affiant. Before obtaining the warrant to search Petitioner's property, Detective Dinonno first went to the Petitioner's home and searched through his closed trash cans, where he found what appeared to be a marijuana stem and possible residue or plant material. The plant material was never tested at the laboratory or in the field to establish its actual composition before obtaining the search warrant. (Tr. 4-26-00, p. 10).

The trash cans in which the Detective searched were located on the Petitioner's property, a significant distance from the street and one day prior to the scheduled trash collection. (Tr. 4-26-00, p. 12). Dinonno stated that he searched the cans based on an anonymous tip that Petitioner was growing marijuana. Yet, a search of the home and garage revealed no marijuana growing and no other indicia of distribution. (Tr. 4-26-00, p. 18). The police search did reveal U.S. currency, a small amount of cocaine, marijuana, a handgun, and a 12 gauge shotgun.

Petitioner was arrested and charged with possession with intent to distribute more than one half ounce, but less than five pounds of marijuana, possession of cocaine, possession of a firearm while in possession of narcotics, and

possession of a firearm in the commission of a felony. Following a conditional plea, the trial court sentenced Petitioner to what it ruled were mandatory minimum sentences for the firearm convictions. (Tr. 2-21-01, p. 20). Petitioner noted his appeal.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. The trial court erred in not suppressing the evidence obtained from an unreasonable search and seizure of a trash can of a private residence.

II. The trial court erred in not suppressing the evidence from an execution of a search when the affidavit lacked any indicia of probable cause.

III. The trial court erred in the imposition of the mandatory minimum sentence of Virginia Code § 18.2-308.2.

IV. The trial court erred in the imposition of the mandatory minimum sentence of the Virginia Code § 18.2-308.4.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I THE TRIAL COURT ERRED IN NOT SUPPRESSING THE EVIDENCE OBTAINED FROM AN UNREASONABLE SEARCH AND SEIZURE OF A TRASH CAN OF A PRIVATE RESIDENCE.

It is respectfully submitted that both the search of the Petitioner's trash can and the affidavit on which the search warrant was obtained exceeded the scope of the Fourth Amendment. In order for a warrantless search and seizure of a trash can to comply with Fourth Amendment, the owner must have no expectation of privacy. *California v. Greenwood*, 496 U.S. 35, 39, 108 S.Ct. 1625 (1988). The Petitioner had the city trash cans butted up against and on his property with the trash contents placed in opaque garbage bags. The Petitioner had a reasonable expectation of privacy in the items that were seized from the refuse search because he did not have the cans placed in a manner or "area suited for public inspection. . . for the express purpose of having strangers take it." *Id.*, at 40, 108 S.Ct. 1625 *citing United States v. Reicherter*, 647 F.2d 397, 399 (1981). The city refuse containers were placed in accordance with the Code of the City of Virginia Beach, § 31-27 *Frequency of Collection* which maintains that household trash is to be collected by the City one (1) time a week provided that the cans are located on the curb line of a city right-of-way no earlier than 5:00 p.m. on the day before collection day and by 7:00 a.m. on the day of collection, otherwise the refuse containers are to be removed from view after the day of collection pursuant to §

31-28. City Code § 31-28 further states that the city will not make refuse collection on private property. (*emphasis added).* Trash pick up was scheduled for the next day. Petitioner's trash receptacle was not curbside but still on his property.

The Petitioner testified that the black can, the can given by the City of Virginia Beach expressly for trash, was placed against his fence with six inches of the sixteen inch bottom on his property and the rest was on an easement. (Tr. 4-26-00, p. 40). The easement is a Virginia Power easement and not public property. No right of ingress or egress existed to the public. A survey of the property supported the Petitioner's testimony because the survey indicated that a half a foot remained where the fence ended (Tr. 4-26-00, p. 38). Officer Dinonno in his affidavit for search warrant erroneously stated that the container was located on the property of Brandon Middle School. The Petitioner testified that a survey of his property places the Middle School seventeen and a half feet from his fence were the cans were placed. (Tr. 4-26-00, p. 38). Because the cans were within the Petitioner's property and were placed in such a manner as to manifest an expectation of privacy, the trial court erred in not suppressing the evidence found through the illegal refuse search. The area where the trash cans were located was clearly not open for public observation or access. In addition to the fence and location of the trash cans on the Petitioner's property, the trash cans were shrouded by trees, were in immediate proximity to the Petitioner's house, and were located in an area used solely for family purposes. (Tr. 4-26-00, p. 44). It would constrain logic to suggest a member of the public would feel he had a right to trespass on the Petitioner's property.

II THE TRIAL COURT ERRED IN NOT SUPPRESSING THE EVIDENCE FROM AN EXECUTION OF A SEARCH WHEN THE AFFIDAVIT LACKED ANY INDICIA OF PROBABLE CAUSE.

There was no substantial basis for the magistrate to find probable cause. Code § 19.1-85 [Repl. Vol. 1960] provides in part: "No search warrant shall be issued until there is filed with the officer authorized to issue the same an affidavit of some person alleging briefly material facts, constituting probable cause for the issuance of such warrant. No such warrant shall be issued on an affidavit omitting such essentials." In the present case the "material facts" which the affiant says constituted probable cause for the issuance of the warrant, is "an anonymous complainant" alluded to "narcotic activity" at the Petitioner's residence and "observed subjects leaving the garage with bags of marijuana in their hands." This statement does not reflect what this information consists of, no time frame is indicated, nor does it reflect whether the information was based on personal knowledge of the informant who was unknown to the affiant. There is no evidence to believe that the information given by the anonymous complainant is reliable. The affidavit is no more than a statement or conclusion without any basis and also the anonymous tip was made ten (10) days prior to the surveillance. The affiant did conduct surveillance but nothing in the affidavit indicates that the anonymous complainant was corroborated. Officer Dinonno concedes that the information by itself was insufficient to establish the probable cause needed to obtain a search warrant. The Petitioner contends the small amount of marijuana found

from the refuse search is insufficient to corroborate the anonymous tip and to establish probable cause for the search warrant. Therefore, the evidence should have been suppressed, because there was no statement of underlying circumstances, no indication of reliability of the anonymous citizen complainant, the facts are insufficient, and the conclusory nature of the material facts fail to support the affidavit in establishing probable cause. *Colaw v. Commonwealth,* 32 Va. App. 806, 810, 531 S.E.2d 31, 33 (2000).

III THE TRIAL COURT ERRED IN THE IMPOSITION OF THE MANDATORY MINIMUM SENTENCE OF VIRGINIA CODE § 18.2-308.2.

Virginia Code § 18.2-308.2 is unconstitutionally vague and was improperly imposed on the Petitioner. The statues first alleges a person is guilty of a Class 6 felony when he is guilty of a felony and in possession of a firearm. The statute then imposes a minimum mandatory sentence of two (2) years when a person is convicted of "any other felony." Where a statute contains no express definition of a term, the general rule of statutory construction is to infer intent of the legislature from the language and the plain meaning of the words. *City of Virginia Beach v. Flippen*, 251 Va. 538, 467 S.E.2d 471 (1996). With three punishments combined in one statute it is impossible to ascertain the legislative intent and the plain meaning behind the statute and is therefore unconstitutionally vague.

IV THE TRIAL COURT ERRED IN THE IMPOSITION OF THE MANDATORY MINIMUM SENTENCE OF VIRGINIA CODE § 18.2-308.4.

Virginia Code § 18.2-308.4 is unconstitutionally vague and inapplicable because the ordinary meaning of "section" should be applied when reading the statute. Following the ordinary meaning given the context as it is referred in Section B would indicate that the punishment is only applicable for a violation of Section B and not Section A. However, even if the Court determines that the punishment set forth in Section B is applicable to a violation of Section A, the legislative intent cannot be to sentence a person with a lesser offense the same as one who violates Section B which, is a greater offense. Therefore, the sentencing set forth in Section B does not apply to Section A. Therefore, the trial court erred in sentencing the Petitioner with the minimum mandatory five (5) year sentence without parole.

CONCLUSION

For the reasons stated, your Petitioner prays that the Court will grant this Petition for Writ of Certiorari.

Respectfully submitted,

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Attorney for Petitioner

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Attorney for Petitioner

No._____

In The Supreme Court of the United States

MICHAEL A. KOZIS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

APPENDIX

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VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday *the* 16th *day of* July, 2003.

Michael Anthony Kozis, Appellant,
against Record No. 030158
Court of Appeals No. 0723-01-1
Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court refuses the petition for appeal.

The Circuit Court of the City of Virginia Beach shall allow court-appointed counsel the fee set forth below and also counsel's necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this Court and in the courts below.

Justice Agee took no part in the consideration of this case.

A Copy,
Teste:

Patricia S. Krueger, Clerk

By: /s/ Sharon R. Kelly

Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond, on Friday *the* 1st *day of* November, 2002.

Michael Anthony Kozis, Appellant,
against
Commonwealth of Virginia,
Appellee.

From the Court of Appeals of Virginia

Upon consideration of the motion of the Commonwealth, by the Attorney General of Virginia, leave hereby is granted Michael Anthony Kozis to proceed in forma pauperis, to file a notice of appeal and to apply to this Court for an appeal from the judgment rendered against him by the Court of Appeals on November 16, 2001.

On further consideration whereof, it is ordered that the Circuit Court of the City of Virginia Beach appoint counsel to represent the appellant on this appeal, unless counsel has already been appointed, and that all computations of time as required by the rules of this Court and applicable statutes commence on the date of entry of this order or from the date of entry of the order of this circuit court so appointing counsel, whichever date shall be later.

This order shall be certified to the Court of Appeals of Virginia and to the Circuit Court of the City of Virginia Beach.

A copy,
Teste:

/s/ David B. Beach
Clerk

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA

COMMONWEALTH OF VIRGINIA,
Plaintiff,
v. CAV Record No. 0723-01-1
Circuit Court Case No. CR99-4905
MICHAEL ANTHONY KOZIS,
Defendant.

MOTION

The Commonwealth of Virginia, by counsel, represents this Court as follows:

1. Michael Anthony Kozis was convicted in the Circuit Court of Virginia Beach on February 21, 2001, of possession of a firearm after being convicted of a felony, possession of a firearm while in possession of a controlled substance, possession of cocaine, and possession with intent to distribute marijuana. He was sentenced to 14 years in prison, with 7 years suspended.

2. The petitioner, by counsel, noted an appeal of his conviction to the Court of Appeals of Virginia, which denied the petition on November 16, 2001. (Record No. 0723-01-1).

3. The petitioner's counsel failed to file a notice of appeal with the Court of Appeals, and this Court dismissed the petition on January 25, 2002. (Record No. 020004).

4. Kozis, by counsel, filed a habeas corpus petition in the Circuit Court of the City of Virginia Beach, alleging he had been denied his right to appeal to this Court. On October 21, 2002, the Circuit Court entered an Order finding that Kozis was denied his right to appeal his convictions. The Court directed the Commonwealth to apply to this Court for leave for Kozis to file a belated notice and petition for appeal. (See attached copy of Court Order).

5. It is represented to this Court that there is available a copy of the transcript of Robinson's criminal trial.

WHEREFORE, the Commonwealth of Virginia prays that the Court enter an order permitting Michael Anthony Kozis to file a belated notice and petition for appeal to this Court from judgment of the Court of Appeals of Virginia, entered November 16, 2001, in Record No. 0723-01-1 (Circuit Court Case NO. CR99-4905), and directing the Circuit Court of the City of Virginia Beach to appoint counsel for the defendant to perfect such an appeal.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

By: /s/ Kathleen Martin

Kathleen B. Martin
Assistant Attorney General

Office of the Attorney General
900 East Main Street
Richmond, VA 23219
(804) 786-4624
FAX (804) 371-0151

CERTIFICATE OF SERVICE

On October 28, 2002, a copy of this Motion was mailed to James O. Broccoletti, Esquire, Zoby &

Broccoletti, P.C., 6663 Stoney Point South, Norfolk, Virginia, 23502, counsel of record for the petitioner.

/s/ Kathleen Martin
Assistant Attorney General

kbm/vsc motdelappl.doc

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

MICHAEL ANTHONY KOZIS,
Petitioner,

v. **Case No.CL02-2277**
(Criminal Docket No. CR99-4905)

DIRECTOR,
VIRGINIA DEPT. OF CORRECTIONS,
Respondent.

ORDER

Upon mature consideration of the petition of Michael Anthony Kozis for a writ of habeas corpus and the answer of the respondent, the Court finds the petitioner is entitled to relief, as he was denied his right to pursue a direct appeal of his criminal convictions from the Court of Appeals of Virginia to the Supreme Court of Virginia. It is, therefore,

ADJUDGED and ORDERED that the petition for a writ of habeas corpus be, and hereby is, granted on the allegation of denial of appeal.

It is further ORDERED that the Commonwealth petition the Supreme Court of Virginia for the right of the petitioner to seek a delayed appeal to the Court from the aforesaid final judgment of conviction of February 21, 2001, in Circuit Court Case No. CR99-4905 (Court of Appeals Record No. 0723-01-1). This matter will be retained on this Court's docket pending action of the appellate court pursuant to this Order.

It is further directed that a copy of this Order be certified to James O. Broccoletti, counselor for the petitioner, and Kathleen B. Martin, Assistant Attorney General.

Entered this 21 day of Oct., 2002.

/s/ A.B. Shockley

I ask for this:

/s/ Kathleen B. Martin

Kathleen B. Martin
Assistant Attorney General
Counsel for Respondent

Seen and Agreed:

/s/ James O. Broccoletti

James O. Broccoletti
Counsel for Petitioner

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

MICHAEL ANTHONY KOZIS,
Petitioner,

v. **CL02-2277**

VIRGINIA DEPARTMENT OF CORRECTIONS,
VIRGINIA BEACH CORRECTIONAL CENTER,
VIRGINIA BEACH SHERIFF PAUL LANTEIGNE,
Respondent

ORDER

A petition for Writ of Habeas Corpus, signed and verified by the petitioner, was filed in this Court on August 7, 2002.

It is **ORDERED** that the respondent file an answer in this Court, within 60 days of the date of the entry of this order, to show cause why the writ of habeas corpus should not be issued by this Court.

The petitioner shall inform the Court and the Attorney General of Virginia, in writing, of any changes of address in the event the petitioner is transferred, released, or otherwise relocated during the pendency of the action. Failure to do so may result in dismissal of the action.

The clerk is **DIRECTED** to serve the respondent by mailing a copy of this Order, with the petition attached, to the Attorney General of Virginia. A copy of this Order shall also be sent to the petitioner.

ENTER: 8/13/02

/s/ A. B. Shockley
JUDGE

Clerk:mlm

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 25th *day of* January, 2002.

Michael Anthony Kozis,

Appellant,

against Record No. 020004
Court of Appeals No. 0723-01-1

Commonwealth of Virginia,

Appellee.

From the Court of Appeals of Virginia

Finding that the appeal was not perfected in the manner provided by law, the Court dismisses the petition for appeal filed in the above styled case. Rule 5:14(a).

A Copy,
Teste:

David B. Beach, Clerk

By: /s/ Jennifer G. Earl

Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Tuesday *the* 4th *day of* December, 2001.

Michael Anthony Kozis, Appellant,
against Record No. 0723-01-1
Circuit Court No. CR99-4905
Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing En Banc

On December 4, 2001 came Michael Anthony Kozis, by counsel, and filed a petition for rehearing en banc from the panel's decision denying the petition for appeal in this case.

The Rules of the Court do not provide for the filing of a petition for rehearing or a petition for rehearing en banc upon a denial by a three-judge panel after its consideration of a petition for appeal denied by a judge of the Court pursuant to Code § 17.1-407. See Rule 5A:15 (b). Accordingly, the petition for rehearing en banc hereby is dismissed.

A Copy,
Teste:

Cynthia L. McCoy, Clerk

By: /s/
Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Friday *the* 16th *day of* November, 2001.

Michael Anthony Kozis, Appellant,
v. Record No. 0723-01-1
Circuit Court No. CR99-4905
Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Virginia Beach
Before Judge Bumgardner, Retired Judges Sarver and Trabue*

For the reasons previously stated in the order entered by this Court on September 28, 2001, the petition for appeal in this case is hereby denied.

This order shall be certified to the trial court.

---

*Retired Judge Perry W. Sarver and Kenneth E. Trabue took part in the consideration of this case by designation pursuant to Code § 17.1-400.

A Copy,
Teste:

Cynthia L. McCoy, Clerk

By: /s/
Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Friday *the* 28th *day of* September, 2001.

Michael Anthony Kozis,
Appellant,
against Record No. 0723-01-1
Circuit Court No. CR99-4905
Commonwealth of Virginia,
Appellee.

From the Circuit Court of the City of Virginia Beach
Before Retired Judge Duff*

This petition for appeal has been reviewed pursuant to Code § 17.1-407 (C) and is denied for the following reasons:

I. On appeal of a ruling on a motion to suppress, we view the evidence in light most favorable to the prevailing party, here the Commonwealth, granting to it all reasonable inferences fairly deductible therefrom. *See Commonwealth v. Grimstead*, 12 Va. App. 1066, 1067, 407 S.E.2d 47, 48 (1991). "[W]e are bound by the trial court's finding of historical fact unless 'plainly wrong' or without evidence to support them[,] and we give due weight to the inferences drawn from those facts by resident judges and local law enforcement officers." *McGee v. Commonwealth*, 25 Va. App. 193, 198, 487 S.E.2d 259, 261 (1997) (*en banc*) (citing *Ornelas v. United States*, 517 U.S. 690, 699 (1996)). However, we review *de novo* the trial court's application of defined legal standard to the particular facts of the case. *See Ornelas*, 517 U.S. at 699.

On August 30,1999, Detective Joseph Anthony Dinonno received an anonymous complaint of narcotics activity at a specified address. On September 9, 1999, at approximately 11:00 p.m., the evening before the trash would normally be collected, Dinnono searched the appellant's trash

cans and found marijuana stems and residue, as well as a syringe, an envelope with razor blades, and mail addressed to appellant. The trash cans were located on the outside of a fence at the back of appellant's yard. Dinnono testified that he believed at the time that the property belonged to an adjacent school.

"Under the Fourth Amendment, a search is an invasion into a space or area where a person has a reasonable expectation of privacy in the 'person' or the person's 'houses,' 'papers,' or 'effects,'" *Hughes v. Commonwealth*, 31 Va. App. 447, 455, 524 S.E.2d 155, 159 (2000). To determine whether a citizen "enjoys a reasonable expectation of privacy. . . we consider whether he [or she] has exhibited an expectation of privacy in the object and whether that expectation is one that 'society is prepared to recognize as reasonable.'" *Anderson v. Commonwealth*, 25 Va. App. 565, 576, 490 S.E.2d 274, 279 (1997) (quoting *Katz v. United States,* 389 U.S. 347, 361 (1967). (Harlan, J., concurring)), *aff'd*, 256 Va. 580, 507 S.E.2d 339 (1998). "[W]here private lands are exposed to observation by members of the public who may legitimately come upon the property, a citizen does not reasonably have an expectation of privacy in areas that the passing public can observe." *Shaver v. Commonwealth*, 30 Va. App. 789, 795, 520 S.E.2d 393, 396 (1999). "[S]ociety would not accept as reasonable [appellant's] claim to an expectation of privacy in trash left for collection in an area accessible to the public." *California v. Greenwood*, 486 U.S. 35, 41 (1988). "'[T]he overwhelming weight of authority rejects the proposition that a reasonable expectation of privacy exists with respect to trash discarded outside the home and the curtilege [*sic*] thereof.'" *Id.* at 42 (quoting *United States v. Thornton*, 746 F.2d 39, 49, and n.11 (D.C. Cir. 1984)). "When . . . a fence is erected it ordinarily defines the curtilege" of a house. *Patler v. Commonwealth*, 211 Va. 448, 451, 177 S.E.2d 618, 620 (1970). Appellant's

trash cans were on the outside of a fence bordering his property. The area was open to public observation and access. The trial court did not err in finding that appellant did not have a reasonable expectation of privacy in the trash cans outside the fence surrounding his property.

II. "Upon review, a search warrant will be upheld if the evidence, viewed as a whole, provided the magistrate a 'substantial basis' for concluding that probable cause existed to issue the warrant." *Gwinn v. Commonwealth*, 16 Va. App. 972, 975, 434 S.E.2d 901, 903 (1993). A search warrant must be supported by an affidavit that contains material facts supporting the probable cause for issuing the warrant. *See* Code § 19.2-54.

> In determining whether a search warrant affidavit furnishes probable cause, we follow the "totality-of-the-circumstances approach" adopted by the United States Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 231-32 (1983). "The probable cause inquiry conducted by the magistrate entails 'a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" In reviewing the magistrate's probable cause determination, we must decide "'whether the evidence viewed as a whole provided a "substantial basis" for the Magistrate's finding of probable cause.'"

West v. Commonwealth, 16 Va. App. 679, 687, 432 S.E.2d 730, 735 (1993) (citations omitted).

Dinnono appeared before a magistrate on September 10, 1999 and obtained a search warrant for appellant's residence. In his sworn affidavit, Dinnono stated that he had

received a complaint that the residents of the property were growing and selling marijuana. The informant indicated that "Mike" previously had been arrested for distribution of marijuana. Dinnono also noted in his affidavit that he had found 6.7 grams of marijuana plant stems, marijuana residue, a syringe, razor blades, and appellant's mail in the trash cans. The trial court did not abuse its discretion in finding that there was a substantial basis for believing probable cause existed to issue the warrant.

III. Code § 18.2-308.2 clearly prohibits convicted felons from possessing or transporting firearms. Code §18.2-308.2 "is by no means complex or difficult for one of ordinary intelligence to comprehend." *Hicks v. Commonwealth*, 33 Va. App. 561, 573, 535 S.E.2d 678, 684 (2000).

Appellant finds fault with the statute's sentencing provision which states in pertinent part:.

> Any person who violates this section shall be guilty of a Class 6 felony. However, any person who violates this section by knowingly and intentionally possessing or transporting any firearm and who was previously convicted of a violent felony as defined in § 17.1-805 shall not be eligible for probation, and shall be sentenced to a minimum, mandatory term of imprisonment of five years. Any person who violates this section by knowingly and intentionally possessing or transporting any firearm and who was previously convicted of any other felony shall not be eligible for probation, and shall be sentenced to a minimum, mandatory term of imprisonment of two years. The minimum, mandatory terms of imprisonment prescribed for violation of this section shall not be suspended in whole or

> in part and shall be served consecutively with any other sentence.

Code § 18.2-308.2. The statute explains that possession of a firearm after having been convicted of a felony is a Class 6 felony, which carries a maximum sentence of five years. The statute then states that there are certain minimum, mandatory sentencing requirements. These include a five-year minimum if underlying felony conviction was violent one, as defined in Code § 17.1-805, and a two-year minimum for all other felonies. The sentencing provision of Code § 18.2-308.2 is clear and does not encourage discriminatory enforcement. We do not find this statute unconstitutionally vague, either on its face or as applied to appellant.

IV. Code § 18.2-308.4 provides in pertinent part:

> A. It shall be unlawful for any person unlawfully in possession of a controlled substance . . . to simultaneously with knowledge and intent possess any firearm.
>
> B. It shall be unlawful for any person to possess, use, or attempt to use any pistol, shotgun, rifle, or other firearm or display such weapon in a threatening manner while committing or attempting to commit the illegal manufacture, sale, distribution, or the possession with the intent to manufacture, sell, or distribute a controlled substance classified in Schedule I or Schedule II of the Drug Control Act . . . of Title 54.1 or more than one pound of marijuana.
>
> Violation of this section shall constitute a separate and distinct felony and any person convicted thereof shall be guilty of a Class 6 felony, shall not be eligible for

> probation and shall be sentenced to a minimum, mandatory term of imprisonment of five years, which shall not be suspended in whole or in part.

Appellant contends that Code § 18.2-308.4 is unconstitutionally vague because it fails to proscribe a penalty for violation of subsection (A), that is, possession of a firearm while simultaneously possessing a controlled substance and that to the extent the statute provides a penalty, it is ambiguous and confusing. He takes the view that the only punishment provided for a violation of Code § 18.2-308.4 is contained in the third unlettered paragraph, which, he argues, applies only to the subsection (B). We disagree.

To construe the statute as appellant urges would have us attribute to the General Assembly the creation of a criminal offense without providing for any punishment for a violation of that offense, a result that is irrational and which we will not ascribe to the legislature. The penalty provision of the statute proscribes the penalty for a violation of either subsection (A) or (B). Thus, Code § 18.2-308.4(A) and the penalty provision, when read together, simultaneously possessing a firearm is a Class 6 felony, requiring imposition of a minimum, mandatory five-year term of imprisonment for such a violation.

This order is final for purposes of appeal unless, within fourteen days from the date of this order, there are further proceedings pursuant to Code § 17.1-407(D) and Rule 5A:15(a). If appellant files a demand for consideration by a three-judge panel, the demand should include a statement, not to exceed one typewritten page, identifying how this order is in error.

---

*Retired Judge Charles H. Duff considered this case by designation pursuant to Code § 17.1-400(d).

A Copy,
Teste:

Cynthia L. McCoy, Clerk

By: /s/ Marty V.P. Ring
Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Monday *the* 4th *day of* June, 2001.

Michael Anthony Kozis, Appellant,
against Record No. 0723-01-1
Circuit Court NO. CR99-4905
Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Virginia Beach

On preliminary examination, the Court concludes that the volume of transcript of the November 22, 2000 hearing was not timely filed in this case, see Rule 5A:8, and that no extension of time in which to file this volume of transcript or statement of facts is now possible, Jordan v. Price, 3 Va. App. 672, 353 S.E.2d 168 (1987). While the absence of the transcript or statement of facts does not always deprive this Court of jurisdiction, the Court will consider only those issues which may be decided without reference to a transcript or statement of facts. When a transcript is indispensable to the determination of an issue, the absence thereof in the record is a jurisdictional defect and require dismissal of the claim. See Goodpasture v. Goodpasture, 7 Va. App. 55, 57, 371 S.E.2d 845, 846 (1988) (family law case saved from dismissal by judge's letter opinion, other documents). E.g., Anderson v. Commonwealth, 13 Va. App. 506, 413 S.E.2d 75 (1992) (statement of facts in criminal case); Turner v. Commonwealth, 2 Va. App. 96, 341 S.E.2d 400(1986) (transcript in criminal case); Barrett v. Barrett, 1 Va. App. 378, 380, 339 S.E.2d 208, 210 (1986) (neither filed).

Accordingly, it is ordered that appellant shall show cause, by a reply to this order on or before June 19, 2001, why this appeal should not be dismissed. In any response to this order, the appellant shall state clearly any questions properly presented by this appeal, see Rules 5A:12 (c) and

5A:20(c), and preserved for appellate review, see Rule 5A:18, which can be considered without resort to this volume of transcript. Appellant shall further explain why the questions can be decided without reference to this volume of transcript.

The period for filing pleadings shall not be enlarged by this order.

A Copy,
Teste:

Cynthia L. McCoy, Clerk

By: /s/ Rosellis J. Graham

Deputy Clerk

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF VIRGINIA BEACH

HEARING DATE: FEBRUARY 21, 2001
JUDGE: SHOCKLEY

COMMONWEALTH OF VIRGINIA
vs
MICHAEL ANTHONY KOZIS, DEFENDANT
SSN: 170-48-6926
DOB: 1/25/60
SEX: MALE

SENTENCING ORDER-CASE NO.: CR99-4905

Attorney for the Commonwealth: M. Capoldo
Attorney for the Defendant: J. Hooker
Court Reporter: Ronald Graham and Associates, Inc.

The defendant was present and represented by counsel.

On 11/22/00, the defendant was found GUILTY of the following offense(s):
Offense Description and Indicator (F/M) and Date and Code Section:
POSSESSION OF A FIREARM WHILE IN POSSESSION OF A CONTROLLED SUBSTANCE (FELONY)(OFFENSE DATE: 9/10/99)(§ 18.2-308.4)
POSSESSION OF A FIREARM BY A CONVICTED FELON (FELONY)(OFFENSE DATE: 9/10/99)((§ 18.2-308.2)
POSSESSION OF MARIJUANA WITH THE INTENT TO DISTRIBUTE (FELONY)(OFFENSE DATE: 9/10/99)(§ 18.2-248.1)
POSSESSION OF SCHEDULE I OR SCHEDULE II CONTROLLED SUBSTANCE (FELONY)(OFFENSE

DATE: 9/10/99)(§ 18.2-250)

The presentence report was considered and filed as part of the record in accordance with the provisions of Code § 19.2-299.

The Court reviewed and considered the applicable discretionary sentencing guidelines and made the completed worksheet a part of the record of the case pursuant to the provisions of the Code § 19.2-299.

The Statewide Community-Based Corrections System Report was filed.

Before pronouncing the sentence, the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reason why judgement should not be pronounced.

The Court **SENTENCES** the defendant to:
CR99-4905
Incarceration in the Virginia Department of Corrections for the term of: 2 years on the charge of Possession of a Firearm by a Convicted Felon, a term of 5 years on the charge of Possession of a Firearm while in Possession of a Controlled Substance, a term of 3 years on the charge of Possession of Schedule I or Schedule II Controlled Substance, and a term of 4 years on the charge of Possession of Marijuana with the Intent to Distribute. The total sentence imposed is 14 years.

The Court **SUSPENDS** 7 years of the sentences conditioned on the following:

1. **Good behavior**. The defendant shall be of good behavior for 7 years from the defendant's release from confinement.

2. **Supervised Probation.** The defendant is placed on Supervised Probation and the defendant shall comply with all the rules and requirements set by the Probation Officer. LENGTH OF PROBATION: For 1 year or unless sooner released by the Probation Officer. PROBATION TO BEGIN: Upon release from confinement.

Suspension of license for drug charge with an offense date on or after July 1, 1992.
Pursuant to § 18.2-259.1 the defendant's privilege to drive or operate a motor vehicle, engine, or train in the Commonwealth is suspended for a period of six months from 2/21/01.
Distribution of Copies. The Clerk shall send a copy of this order to the:
Sheriff
Director of the Department of Corrections
Sentencing Guideline Committee
Probation Office of this Court
Department of Motor Vehicles

Payment after release. $1842.00 Costs. Payment to be made after defendant's release from confinement.
Credit provision when time to be served. The defendant shall be given credit for time spent in confinement while awaiting trial pursuant to § 53.1-187.
Sentencing Summary:
TOTAL SENTENCE IMPOSED :14 YEARS
TOTAL TIME SUSPENDED : 7 YEARS

The defendant expressed an intention to appeal this case to the Court of Appeals, upon written notice of appeal, the defendant shall post an appeal bond of $2,500.00 with surety in addition to the $7,500.00 surety bond already posted on 9/22/99.

ENTERED: 3/1/01
/s/ A. B. Shockley

VIRGNIA:

In the Circuit Court of the City of Virginia Beach

COMMONWEALTH OF VIRGINIA,
PLAINTIFF

DOCKET #: CR99-4905

V.

MICHAEL ANTONY KOZIS,
DEFENDANT

ORDER

THIS CAUSE came this day on a motion to suppress evidence collected by Detective DiNonno on a warrantless search of the defendant's trash and the resulting search warrant. The defendant was represented by John D. Hooker, Jr. and the Commonwealth was represented by Megan C. Z. Capoldo, Assistant Commonwealth's Attorney.

For reasons stated on the record, the motion is **DENIED.**

ENTER: 4/27/00

/s/ Kenneth W. Whitehurst

JUDGE KENNETH W. WHITEHURST

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH
COMMONWEALTH OF VIRGINIA,
Plaintiff,
v. Docket No.
MICHAEL KOZIS,
Defendant.

MOTION TO SUPPRESS

COMES NOW, the Accused, Michael Kozis, by counsel, and moves this Honorable Court to enter an Order suppressing any evidence seized as a result of the search of garbage receptacles belonging to the Accused, as said search and seizure was in violation of his rights afforded to him by the Fourth Amendment of the Constitution of the United States of America and the Constitution of the Commonwealth of Virginia.

MICHAEL KOZIS

By: /s/ John Hooker
Of Counsel

John D. Hooker, Jr., Esq.
Hooker & Migliozzi, P.C.
1206 Laskin Road, Suite 110
Post Office Box 968
Virginia Beach, VA, 23451
(757) 425-9977
VA Bar # 13309

CERTIFICATE OF MAILING

I certify that a copy of the foregoing Motion to Suppress was mailed, postage pre-paid this 21st day of January, 2000, to the following person(s):

Megan Capoldo, Esq.
Office of the Commonwealth's Attorney
2305 Judicial Boulevard
Virginia Beach, VA 23456

/s/ John D. Hooker, Jr.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH
COMMONWEALTH OF VIRGINIA,
Plaintiff,

Docket No.

v.
MICHAEL KOZIS,
Defendant.

MOTION TO SUPPRESS

COMES NOW the Accused, Michael Kozis, by counsel, and moves this Honorable Court to enter an Order suppressing any evidence seized as a result of the search of his premises and seizure of items from the premises on or about the 9th day of September, 1999, as said search and seizure was in violation of his rights afforded to him by the Fourth Amendment of the Constitution of the United States of America and the Constitution of the Commonwealth of Virginia.

MICHAEL KOZIS

By: /s/ John D. Hooker
By Counsel

John D. Hooker, Jr., Esq.
Hooker & Migiliozzi, P.C.
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